

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ANIMAL LEGAL DEFENSE FUND,
a non-profit corporation, and REGAL VEGAN,
INC.,

No. C 12-05809 WHA

Plaintiffs,

v.

HVFG LLC, (d/b/a “Hudson Valley Foie Gras”),
MARCUS HENLEY, MICHAEL GINOR, IZZY
YANAY, and RICHARD BISHOP,

Defendants.

**ORDER GRANTING
IN PART AND DENYING
IN PART DEFENDANTS’
MOTION FOR PARTIAL
JUDGMENT ON THE
PLEADINGS**

INTRODUCTION

In this false advertising action over foie gras marketing, defendants move for partial judgment on the pleadings under Rule 12(c). For the following reasons, defendants’ motion is **GRANTED IN PART** and **DENIED IN PART**.

STATEMENT

Plaintiffs Animal League Defense Fund, an animal rights advocacy group, and Regal Vegan, Inc., a purveyor of plant-based pâté, allege that defendants HVFG LLC and four of its officers (collectively “Hudson Valley”) violated the Lanham Act and California’s unfair competition and false advertising laws by marketing their foie gras as “the humane choice.”

The following facts relevant to this motion are alleged in the complaint. HVFG is the largest foie gras producer in the United States. Foie gras is a delicacy (which is sometimes in

1 the form of a pâté), produced from the livers of farm-fattened ducks or geese (defendants raise
2 ducks only). Hudson Valley markets its product as “the humane choice” online through its
3 website, Facebook page and Twitter page, and in its printed marketing materials (Compl.
4 ¶¶ 17–24). Defendant Yanay, co-owner of HVFG, also appeared in an online video where she
5 stated that “it is very important that people understand ducks on this farm are not hurt and they
6 are not in any kind of discomfort” (*id.* at ¶ 25).

7 Hudson Valley’s ducks are force-fed two or three times a day: “[A]n inflexible,
8 unlubricated tube is forcibly inserted into their esophagi. Within seconds, a large volume
9 of . . . corn mash is pneumatically delivered through this ten-inch tube directly into the bird’s
10 stomach” (*id.* at ¶ 51). Some ducks die from the force-feeding before they can be slaughtered,
11 although slaughter is timed to occur just before force-feeding typically becomes fatal.
12 Common injuries and illnesses that result from this process include ruptured esophagi, bone
13 fractures, inhalation of food into the lungs, and hepatic lipidosis, which causes liver failure
14 and seizures. The ducks are not given veterinary treatment and so may suffer with these ailments
15 for up to four weeks until they die or are slaughtered (*id.* at ¶¶ 61, 63, 71). Plaintiffs insist
16 that defendants’ slogan for their foie gras — “the humane choice” — is therefore false and
17 misleading. This allegedly harmed plaintiffs because, if the slogan is in fact untrue, the
18 misrepresentation plausibly led consumers to mistakenly believe that foie gras production
19 is humane. Foie gras production is in fact inevitably *inhumane*, or so it is alleged.

20 Plaintiff Regal Vegan, a new and small firm, makes a spreadable product dubbed
21 “Faux Gras” made primarily from beans. Styled as an alternative to animal-based pâtés,
22 Faux Gras is sold in stores in Colorado and Washington D.C., as well as online through the
23 company’s website. Regal Vegan asserts that its sales are hampered by Hudson Valley’s
24 misleading branding, and that if consumers knew that the Hudson Valley foie gras was in fact
25 not humanely produced, consumers would be more likely to buy Faux Gras.

26 Plaintiff ALDF is an advocacy group that targets animal cruelty through the legal system.
27 The organization expends resources on educating the public about foie gras production
28 methods and lobbying the legal and business communities to combat and denounce the practice.

1 For example, ALDF has coordinated press releases and letter-writing campaigns on the cruelty
2 of force-feeding, conducted extensive legal research on possible strategies to combat it, and
3 collected expert testimony to support these efforts. Although California law bans force-feeding
4 birds to produce the enlarged liver necessary to make foie gras and prohibits selling products that
5 rely on force-feeding, out-of-state foie gras producers may still ship their products to California.
6 Cal. Health & Safety Code Section 25982.

7 Plaintiffs' complaint alleges that Hudson Valley's marketing violates the Lanham Act,
8 and California Business and Professions Code Section 17200 and Section 17500. The complaint
9 also pleads claims against certain individual defendants for aiding and abetting and for
10 conspiracy (both of which are tied to the alleged violations of the Lanham Act, Section 17200,
11 and Section 17500). Finally, plaintiffs allege a claim for respondeat superior against defendants
12 Izzy Yanay and Michael Ginor as co-owners of HVFG.

13 In February 2013, defendants filed a motion to dismiss pursuant to Rule 12(b)(1) for
14 lack of Article III standing, and a motion to dismiss pursuant to Rule 12(b)(6) for lack of
15 Lanham Act standing and for failure to state a Lanham Act claim. The motion as to Regal
16 Vegan's Article III standing was denied, and the issue of ALDF's Article III standing therefore
17 became irrelevant. *See Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1993). The motion to
18 dismiss under Rule 12(b)(6) was denied as to Regal Vegan, but the April 12 order found that
19 ALDF lacked standing to pursue a Lanham Act false advertising claim because it does not
20 compete with Hudson Valley to sell anything, and so does not "vie for the same dollars from
21 the same consumer group" (Dkt. No. 50 at 8 (quoting *TrafficSchool.com, Inc. v. Edriver, Inc.*,
22 653 F.3d 820, 826 (9th Cir. 2011))).

23 Defendants now move for partial judgment on the pleadings under Rule 12(c) on two
24 grounds: *First*, against plaintiff ALDF for lack of statutory standing to bring a claim for relief
25 under either Section 17200 or Section 17500. *Second*, against both plaintiffs because their
26 claims of conspiracy, respondeat superior, and aiding and abetting are not cognizable claims
27 upon which relief can be granted.
28

ANALYSIS

1. LEGAL STANDARD.

Our court of appeals has held:

Judgment on the pleadings is properly granted when, accepting all factual allegations in the complaint as true, there is no issue of material fact in dispute, and the moving party is entitled to judgment as a matter of law. Analysis under Rule 12(c) is substantially identical to analysis under Rule 12(b)(6) because, under both rules, a court must determine whether the facts alleged in the complaint, taken as true, entitle the plaintiff to a legal remedy.

Chavez v. United States, 683 F.3d 1102, 1108–09 (9th Cir. 2012) (quotations omitted).

2. STANDING UNDER SECTION 17200 AND SECTION 17500.

In 2004, the California electorate substantially narrowed the standing requirements of Section 17200 and Section 17500 by passing Proposition 64. Standing is now limited to those who have lost money or property by reason of the challenged practice. Neither our court of appeals nor the California appellate courts have decided whether a public advocacy firm such as ALDF can have standing under Proposition 64 to challenge a business practice inimical to its purpose and against which the firm expends its resources, thus reducing the money and property it would otherwise have for other projects. The only decision on point is by Judge Consuelo Marshall in *Southern California Housing Rights Center v. Los Feliz Towers Homeowners Association*, 426 F. Supp. 2d 1061, 1069 (C.D. Cal. 2005). That decision held that even after the passage of Proposition 64, an advocacy organization has standing under Section 17200 when it diverts resources in response to challenged unlawful activity.

This order recognizes that if standing is conferred on such advocacy organizations then standing might also have to be extended, by the same logic, to individuals who divert their charitable giving from one cause to another in order to combat a proscribed business practice — and further recognizes that such an extension would effectively take us back to the “any person” standing problem that Proposition 64 sought to cure. On the other hand, if a competitor has standing by reason of money or property spent to combat a proscribed business practice, as a competitor surely does, then why should a public interest organization not have standing for the same reason? This can be argued either way. In the absence of controlling precedent, this order

1 will follow Judge Marshall's decision and recognize ALDF as a permissible plaintiff under
2 Sections 17200 and 17500. This order further holds that the foregoing is true both for proscribed
3 business practices as well as for false advertising, for the Court can see no reasoned basis for
4 treating them differently. Defendants' motion is therefore **DENIED**.

5 **3. PLAINTIFFS' DEPENDENT CLAIMS.**

6 Hudson Valley asserts that plaintiffs' conspiracy, respondeat superior, and aiding and
7 abetting claims should all be dismissed because they are not cognizable claims. At the hearing
8 on this motion, the parties were asked to submit supplemental briefing on whether the agency
9 immunity doctrine should bar these claims because they seek to impose liability on employees
10 of defendant HVFG.

11 **A. Respondeat Superior.**

12 Hudson Valley asserts that respondeat superior cannot be a valid claim under California
13 law. This order agrees. "Respondeat superior is not an independent cause of action; rather it is
14 a theory of liability." *Fidelity Nat'l Title Ins. Co. v. Castle*, No. 11-00896, 2011 WL 6141310
15 at *15 (N.D. Cal. Dec. 8, 2011) (Judge Susan Illston). This order pauses to note that plaintiffs
16 may still rely on the *theory* of respondeat superior as a basis of liability for defendant co-owners
17 Yanay and Ginor, provided that it is adequately alleged. At this time, Hudson Valley only
18 questions the viability of respondeat superior as a claim and does not challenge the merits of the
19 theory. This order likewise declines to address this issue not raised by defendants.

20 Since plaintiffs' respondeat superior claim does not and cannot present a cognizable
21 claim for relief, it is **DISMISSED**.

22 **B. Conspiracy and Aiding and Abetting.**


23 Plaintiffs' post-hearing brief withdraws their claims for conspiracy and aiding and
24 abetting (Dkt. No. 98 at 2, 4). Those claims are **DISMISSED**.

CONCLUSION

For the foregoing reasons, defendants' motion for partial judgment on the pleadings is
GRANTED IN PART and DENIED IN PART. There shall be no more Rule 12 motions.

IT IS SO ORDERED.

Dated: June 25, 2013.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE